



TC01655

Appeal number: TC/2011/05988

P35 return—Penalty for late return (Taxes Management Act 1970 s.98A)—Reasonable excuse—Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

FMA CONSULTING LTD

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: J. BLEWITT (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 24 November without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 2 August 2011, HMRC's Statement of Case submitted on 13 September 2011 and the Appellant's Reply dated 4 October 2011.

DECISION

1. This is an appeal against a penalty totalling £800 imposed pursuant to Section 98
(2) Taxes Management Act 1970 (“TMA”) in respect of the late filing of the
5 Appellant’s P35 employer’s annual return (P35) for the tax year 2008/2009

The relevant legislation

2. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003
imposes on an employer the obligation to deliver to HMRC a P35 return before the
20th day of May following the end of a tax year. Paragraph (10) of that regulation
10 provides that s.98A of the Taxes Management Act 1970 (the “TMA”) applies to
paragraph (1) of that regulation.

3. Section 98A of the TMA relevantly provides as follows:

15 *(2) Where this section applies in relation to a provision of
regulations, any person who fails to make a return in accordance
with the provision shall be liable—*

*(a) to a penalty or penalties of the relevant monthly amount for each
month (or part of a month) during which the failure continues, but
excluding any month after the twelfth or for which a penalty under
this paragraph has already been imposed, ...*

20 *(3) For the purposes of subsection (2)(a) above, the relevant monthly
amount in the case of a failure to make a return—*

*(a) where the number of persons in respect of whom particulars
should be included in the return is fifty or less, is £100, ...*

4. Section 100(1) of the TMA provides for HMRC to make a determination
25 imposing a penalty under s.98A of the TMA in such amount as it considers correct or
appropriate. Section 100B of the TMA provides for an appeal against the
determination of that penalty. Section 100B(2)(a) provides that in the case of a
penalty which is required to be of a particular amount, the Tribunal may:

30 *(i) if it appears ... that no penalty has been incurred, set the
determination aside,*

*(ii) if the amount determined appears ... to be correct, confirm the
determination, or*

*(iii) if the amount determined appears ... to be incorrect, increase or
reduce it to the correct amount.*

- 35 5. Section 118(2) of the TMA provides for reasonable excuse:

5 *For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.*

Facts

10 6. The filing date for the end of year return was 19 May 2009. The return was filed online on 15 January 2010. On 28 September 2009 a first penalty notice in the sum of £400 was issued, calculated from 20 May 2009 to 19 September 2009. A final penalty notification in the sum of £400 was issued on 20 January 2010 for the period 20 September 2009 to 15 January 2010.

15 **Submissions**

7. The grounds relied upon by the Appellant and set out in the Notice of Appeal dated 2 August 2011 are that the penalty is excessive and disproportionate as the PAYE payments had been paid when due with only £34.30 outstanding which was paid in February 2010.

20 8. A letter dated 27 May 2011 from the Appellant's representative to HMRC which was referred to in the Notice of Appeal reiterated the grounds relied upon by the Appellant and added the penalty notifications publicised on HMRC's website had not been issued to the Appellant.

25 9. The Appellant's representative responded to HMRC's Statement of Case by letter dated 4 October 2011 in which it was stated that the Appellant accepts that the return was filed late and that there is no reasonable excuse. It is submitted that the agent can find no record in their manual post book of receipt of the penalty notification issued by HMRC on 28 September 2009 or the reminder issued on 24 October 2009.

30 10. It is contended that a four month delay in issuing the reminder for submission of the return is inequitable and reliance is placed on the cases of *Energys Holdings UK Ltd v HMRC [2010] UKFTT 20* and *SKG (London) Ltd v HMRC [2009] UKFTT 341* in which the Tribunals considered the issue of proportionality.

35 11. HMRC's Statement of Case can be summarised as follows: the first penalty notification was issued on 28 September 2009 and the final notification on 20 January 2010. A reminder was issued to the agent's address on 24 October 2009. The fact that all PAYE/NIC was up to date save for the balance of £34.30 is a separate issue to that of the penalties imposed. It is submitted that there is no reasonable excuse.

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Decision

12. The Tribunal notes that the Appellant accepts that the return was filed late and that there is no reasonable excuse.

5 13. The Tribunal found as a fact that the issue as to whether all tax liabilities had been paid was a separate issue and did not provide the Appellant with a reasonable excuse for the late filing of the return.

10 14. As regards the delay in notification of the penalties, there is no statutory obligation on HMRC to issue reminders to taxpayers. It is unfortunate that the notification and reminder were not received by the Appellant's agent; however case law has made clear that ultimately the responsibility rests with the employer to ensure that all tax obligations are fulfilled on time. The Tribunal found as a fact that this did not constitute a reasonable excuse.

15 15. The Tribunal considered the issue of proportionality and the cases of *Energys Holdings UK Ltd v HMRC* [2010] UKFTT 20 and *SKG (London) Ltd v HMRC* [2009] UKFTT 341. The Tribunal took the view that the case of *Energys* was distinguishable on the basis that it concerned the imposition of a significant penalty in (£131,881) where the Appellant had been a single day late. The Tribunal found as a fact that in the appeal before it the penalty of £800 could not be described as "plainly unfair."
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16. The Tribunal considered the case of *SKG* but found that it was of little assistance as no determination of the issue of proportionality was made; HMRC withdrew the penalties with the consequence that the appeal was formally allowed without further submissions on proportionality.

25 17. In the absence of a binding decision on the issue of proportionality, the Tribunal finds as a fact that the penalties were correctly charged in accordance with the legislation and this Tribunal has no power to mitigate or interfere with the penalties on grounds of proportionality.

30 18. The burden is on the Appellant to establish a reasonable excuse, on a balance of probabilities. The Tribunal finds that the Appellant has not discharged that burden.

19. The Tribunal confirms the penalties and dismisses the appeal.

35 20. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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TRIBUNAL JUDGE
RELEASE DATE: 13/12/2011

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